Nos. 90-757 and 90-1032

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD CHISOM, *et al.*,

Petitioners,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

UNITED STATES OF AMERICAN,

Petitioner,

v.

CHARLES E. ROEMER, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS RONALD CHISOM, *ET AL.*

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

The wisdom of Louisiana's decision to select the members of its Supreme Court by popular election is not subject to review by this Court. What *is* subject to federal judicial oversight is the process by which that election occurs. The sole question presented by this case is whether section 2 permits African-American voters to

challenge judicial election systems that deny them an equal opportunity to participate in the process of choosing judges, even when that denial is not the consequence of purposeful discrimination.

I. CONGRESS HAS DECISIVELY REJECTED RESPONDENTS' DISTINCTION BETWEEN PURPOSEFUL AND NONPURPOSEFUL DISCRIMINATION

As this Court recognized in *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986), the 1982 amendment to section 2 "[f]irst and foremost . . . dispositively rejects the position of the plurality in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters." Respondents' argument to the contrary--that under subsection 2(a), the intent requirement "remains unchanged," Brief for Respondents at 17--goes beyond even the bounds of overzealous advocacy. The so-called "results" test is expressly contained in subsection 2(a), as amended in

1982.[1] The placement of the "results" language in subsection 2(a) also undermines completely another suggestion advanced by the court of appeals and respondents: that section 2 can be disaggregated into two separate tests, one of which governs judicial elections and the other of which does not. *See LULAC v. Clements*, 914 F.2d at 625 & 628-29; Brief for Respondents at 17-19. The language of section 2 provides no warrant for holding a particular practice vulnerable to attack if it is purposefully discriminatory but immune from attack if it is not. Both the court below and respondents concede, as they must, that section 2 bars Louisiana from adopting or maintaining a judicial election system for the purpose of diluting the voting strength of Orleans Parish's African-American citizen. *See LULAC v. Clements*, 914 F.2d 620, 625 & n. 6 (5th Cir. 1990) (en banc); Brief for Respondents at 1, n.1, and 16. Given that concession and the structure of section 2, they have absolutely no basis for

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[1]Indeed, the word "results" does not even *appear* in subsection 2(b), where respondent suggests it is located. Brief for Respondent at 17.

claiming that the results test is not similarly broad in its coverage.

II. THE LANGUAGE AND STRUCTURE OF THE VOTING RIGHTS ACT, TAKEN AS A WHOLE, COMPEL THE CONCLUSION THAT SECTION 2 COVERS JUDICIAL ELECTIONS

The language of section 2 is unconditional in its prohibition of practices that result in a denial or abridgement of minority voting rights:

> "*No* voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by *any* State . . . in a manner which results in a denial or abridgement of the right of *any* citizen of the United States to vote on account of race or color . . . ."

42 U.S.C. § 1973(a) (emphasis added). When a statute contains such unambiguous language, courts construing the statute's reach must not contract its scope. *See West Virginia University Hospitals v. Casey,* 59 U.S.L.W. 4180, 4184 (1991) (No. 89-994). Had Congress meant to confine section 2's reach to certain elective offices only, it certainly knew how to do so. Section 11(c) of the Act, for example, is limited to elections held solely or in part to fill seven

expressly enumerated positions. 42 U.S.C. § 1973i(c). Section 2, by contrast, contains no such exclusion.

III. SECTION 2'S USE OF THE WORD "REPRESENTATIVES" DOES NOT EXCLUDE JUDICIAL ELECTIONS

The linchpin of respondents' argument lies in their claim that Congress used the word "representatives" intentionally to exempt judicial elections from scrutiny under section 2. That argument fails for two independent reasons: first, the word "representatives" can permissibly be read to include elected state-court judges; second, there is no evidence, either in the statute itself or in the legislative history that Congress chose the word "representatives" to restrict section 2's scope.

A. *Elected State-Court Judges Can Reasonably Be Viewed as "Representatives"*

Contrary to the assertion made by the court below and respondents, *see, e.g., LULAC*, 914 F.2d at 628; Brief for Respondents at 23-29, the word "representatives" does

not unambiguously exclude elected state-court judges.

That the word "representative" is not equivalent to the term "servant of a constituency" is clear. Jurors, as we have already pointed out, are "representatives" of the community, even though they are sworn to be impartial. *See* Brief for Petitioners at 56-62.

Moreover, this Court has recognized that state-court judges perform a central function in representative government. In *Sugarman v. Dougall*, 413 U.S. 634 (1973), Justice Blackmun, writing for eight members of the Court, recognized that "persons holding state elective or important nonelective executive, legislative, *and judicial* positions . . . perform functions that go to the heart of *representative* government." *Id.* at 647 (emphasis added).[2] Thus, this Court should construe the word "representatives" in subsection 2(b) to refer to officials who exercise a function central to the administration of a

[2]Although then-Justice Rehnquist dissented from the Court's holding in *Sugarman*--that a New York statute barring nonresident aliens from civil services jobs was unconstitutional--he, too, recognized that "policy-making for a political community" involved, among other people, "*judges*," *Sugarman*, 413 U.S. at 661 (emphasis added).

representative form of government.

Finally, the states themselves have acknowledged that the function state-court judges perform is in many relevant respects identical to the functions performed by officials in the other branches of government. A particularly salient example is presented by the position taken by the state of Missouri (with the support of 15 other states as *amici curiae*) in *Gregory v. Ashcroft*, No. 90-50. In that case, Missouri has argued that its judges, who are subject to retention elections, are policy-making officials within the meaning of the Age Discrimination in Employment Act, 29 U.S.C. § 630(f): "Judicial decision making . . . is an expression of public policy, no less, and perhaps more, compelling than the modes of expression available to the legislative and executive branches of government." Brief for Respondent at 19, *Gregory v. Ashcroft*, No. 90-50;[3] *see*

[3]Ironically, in *Houston Lawyers' Ass'n v. Attorney General of Texas*, Missouri and many of the same states that supported its claims that judges were clearly elected officials and state policy-makers, take the position as amici supporting the state of Texas that judges are *not* "really" elected, or are not "really" policy-making officials. It is hard to know what sense to make of this abrupt about-face, but it certainly casts substantial doubt on the importance of the states' interests in

also, e.g., Transcript of Oral Argument at 30 ("The list of decisions from [Missouri] courts that have outlined and defined the common law and set the policy for the State of Missouri is endless"); *id.* at 38 (explaining that the judges involved are also "elected officials" within the meaning of the ADEA because they "do answer to the voters").[4] In light of the day-to-day functions performed by state-court judges, respondents' reliance in this case on statements by various courts and commentators regarding the nonrepresentative role played by *federal* courts, *see, e.g.*, Brief for Respondents at 25 & 32 (quoting *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58, 60 (1982), *Mistretta v. United States*, 488 U.S. 361, 407 (1989), the late Alexander Bickel, and Robert Bork), is sadly off

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retaining at-large election systems for judges when such systems would be subject to attack if they involved any other office when the states cannot even agree whether judges are in fact different from other officials. Quite frankly, it suggests the states' purported interests are rather tenuous or pretextual.

[4]Every court to have addressed the question has held that judges who initially obtain office through popular elected are exempted from the ADEA because they are "persons elected to public office," 29 U.S.C. § 630(f), a phrase whose language tracks in pertinent part the language of section 14(c)(1) of the Voting Rights Act.

the mark.

B. *Congress' Use of the Word "Representatives" Was Not Intended to Exempt Judicial Elections from Section 2*

Petitioners recognize, of course, that although the word "representatives" clearly *can* include judges, there are circumstances under which it might be used in a more restrictive fashion. For example, large parts of Title 2 of the United States Code use the word "Representatives" to refer solely to members of the lower house of the United States Congress or in contrast to "Senators." No one, however, contends that Congress used the word "representatives" in section 2 to restrict its scope to members of the United States House of Representatives, or even to members of the lower house of bicameral legislative bodies. Everyone agrees that county commissioners and school board members are covered by section 2. Indeed, Congress' use of the word "representatives" rather than the word used by this Court in *White v. Regester*, 412 U.S. 755 (1973)--"legislators"--

shows that Congress intended for section 2 to reach *more* than simply elections for members of the legislative branch of state governments.

Congress' express intention, therefore, was to cover elections beyond those for legislators. The interchangeable words used by Congress, in the statute and in the legislative history, to refer to the positions within the purview of section 2--"representatives," "candidates," "elected officials," "officeholders," and the like, *see* Brief for Petitioners at 41-42; Brief for the United States at 27-30--provide no basis for distinguishing those non-legislative offices that are primarily executive in nature and those that are predominantly judicial. Section 2's language tracks precisely the terminology used in the definitional provision of the Act--section 14(c)(1)--which, as we explained in our opening brief, unambiguously includes judges. Section 14(c)(1) extends the Act's reach to elections for all "*candidates* for public . . . *office*." 42 U.S.C. § 1973*l*(c)(1) (emphasis added). Similarly, section 2 provides, in delineating the results test, that "[t]he extent

to which members of a protected class have been elected to *office*" is one circumstance to be considered in deciding whether the plaintiffs' voting rights have been violated. 42 U.S.C. § 1973(b) (emphasis added). It would have made no sense for Congress to have viewed the extent to which minority group members have been elected to judicial office as a relevant circumstance[5] in assessing a section 2 claim if such elections were not covered by the statute. Moreover, the immediate juxtaposition of the words "representatives" and "office" shows how Congress used these terms interchangeably to refer to *all* officials holding elective positions.

Given the categorical language used both in section 2 and in section 14(c)(1), this Court should be especially reluctant to imbue the word "representatives" with a restrictive meaning in the complete and utter absence of

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[5]That Congress saw minority electoral success in judicial elections as a significant indicator is shown by its repeated references to the number of elected African-American and Hispanic jurists in the legislative history of the 1970, 1975, and 1982 amendments and extensions of the Voting Rights Act. *See* Brief for Petitioners at 37-39; Brief for the United States at 31.

any explicit or implicit indication of a congressional purpose to adopt such a meaning. That various policy concerns might have led Congress to have exempted judicial elections from coverage under section 2 "had it thought about it," *West Virginia University Hospital*, 59 U.S.L.W. at 4184, cannot justify this Court's judicial construction of such an exemption through a tortured reading of the statutory language.

C. *Congress' Expressed Intentions Are Fully Consistent with Including Judicial Elections Within the Scope of Section 2*

The central goal of the Voting Rights Act and its extensions and amendments has been "to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally." S. Rep. No. 97-417, p. 5 (1982) [hereafter cited as "Senate Report"].[6] Any comprehensive and final resolution of the problem of race discrimination in voting

[6]This Court has recognized the "authoritative" nature of the 1982 Senate Report in discerning Congress' intent. *Thornburg v. Gingles*, 478 U.S. 30, 43 n. 7 (1986).

must reach race discrimination in the mechanisms used to elect judges for, as this Court reiterated a fortnight ago, "[t]he Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State is most compelling in the judicial system." *Powers v. Ohio*, 59 U.S.L.W. 4268, 4272 (1991) (No. 89-5011).

As *Powers* recognized, the two "most significant opportunit[ies] to participate in the democratic process" enjoyed by most citizens are voting and jury service. *Id.* at 4270. But just as racial discrimination in the selection of jurors "offends the dignity of persons and the integrity of the courts," *id.* at 4269, so, too, with racial discrimination in the election of judges. To permit states to use systems for electing judges that deny African-Americans an effective voice tells African-American citizens that their views regarding who should sit in judgment over the entire community are not worthy of the respect accorded the views of white voters, thereby denying African-Americans equal dignity. Moreover, it cannot help but breed cynicism

regarding the fairness of the judicial system as a whole to have a bench so overtly unrepresentative of the community whose power it exercises.

Nothing in the language or legislative history of the Voting Rights Act supports excluding judicial elections from coverage under section 2. In light of the unconditional ban on discriminatory voting mechanisms, the inclusionary language, and the clear congressional purpose to abolish *all* racial discrimination in voting, the most logical and defensible reading of section 2 would reach the kind of discrimination alleged in this case.

IV. RESPONDENTS FUNDAMENTALLY MISCONSTRUE THE FIRST PRONG OF THORNBURG V. GINGLES

In *Thornburg v. Gingles*, 478 U.S. at 48 (emphasis added), this Court identified three circumstances which "*generally*" must be shown to prove a claim of "vote dilution through submergence."[7] The first of these factors

[7]Nothing in the *Gingles* opinion suggests that these three factors must be established to prove *every* claim under section 2's "results" test. For example, even in a community where there is no racial bloc voting, the use of registration practices that disproportionately prevent African-Americans from voting and thus participating in the political process is subject to challenge under section 2. Similarly, even in a community where African-Americans could not form a majority in a single-member district, the use of an anti-single-shot rule, *see, e.g., City of Rome v. United States*, 446 U.S. 156, 184 (1980) (explaining single-shot voting), might be subject to attack under section 2 if the interaction of that rule with racial bloc voting resulted in the defeat of African-American candidates who might otherwise win election.

is that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, . . . the *multimember form* of the district cannot be responsible for minority voters' inability to elect its [*sic*] candidates." 478 U.S. at 50 (emphasis in original). Read in context, what the first prong of the *Gingles* test requires is that plaintiffs challenging a scheme as dilutive show a causal link between the election practice they challenge and their inability to elect the candidates of their choice.

Contrary to respondents' assertion, Brief for Respondents at 41, the test set out in the first prong of *Gingles* does not invariably require presentation of a hypothetical single-member district complying with principles of one-person, one vote. Rather, the first prong

of *Gingles* requires plaintiffs simply to show the existence of a constitutionally acceptable alternative to the existing scheme that would provide them with a more equal opportunity to participate and elect the candidates of their choice. This is a case-specific question "peculiarly dependent on the facts in each case," *Gingles,* 478 U.S. at 79 (internal quotation marks omitted); its contours depend on the precise aspects and consequences of the election structure challenged by plaintiffs in their complaint. In the case of petitioners' to the scheme for electing the Louisiana Supreme Court, such an alternative can be demonstrated by showing that African-American voters are sufficiently numerous and geographically compact to form a majority in a district equivalent in population to already existing Louisiana Supreme Court districts. Thus, petitioners showed that it would be possible to create a majority African-American supreme court district that would be more populous than two of the five existing single-member Supreme Court Districts. *See* Pet. App. at 10a. Respondents' suggestion that without the constraints

of one-person, one-vote, there is no judicially discernible and manageable standard for assessing claims of racial vote dilution, Brief for Respondents at 43, ignores this obvious method for assessing plaintiffs' ability to establish dilution through submergence.[8] Even if states are not obligated to develop *equipopulous districts as a remedy* for racial vote dilution in judicial elections, certainly a showing that an identifiable group of minority voters has less opportunity to elect the candidates of its choice than a similarly numerous group of white voters should satisfy the first prong of *Gingles*. *See* Brief for the United States as Amicus Curiae Supporting Reversal in *Houston Lawyers' Ass'n v. Attorney General of Texas* at 18 ("Group vote dilution occurs when the practical operation of an electoral system effectively erases or minimizes the voting strength of a particular group, such as a racial minority."). As we discuss in the following section, the remedy issue does not define the violation, but should be addressed by the trial

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[8] *See infra* note 9.

court only after a finding of liability.

V. RESPONDENT'S BRIEF ADVANCES ARGUMENTS IRRELEVANT TO THE QUESTION PRESENTED IN THIS CASE

Respondents devote a substantial part of their argument to issues connected with developing a remedy for a violation of section 2. *See* Brief for Respondents at 34-39. Those concerns are irrelevant to the question before this Court: the scope of section 2's coverage.

First, Congress has clearly provided that a state's nondiscriminatory interests cannot trump the compelling constitutional aim of the Voting Rights Act: to eradicate racial discrimination in voting. *See* Senate Report at 29 n. 117 ("even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process"); *id.* at 195 (additional views of Sen. Robert Dole, sponsor and drafter of amended subsection 2(b)) (rejecting the suggestion that "defendants be permitted to rebut a showing of

discriminatory results by a showing of some nondiscriminatory purpose behind the challenged voting practice or structure").

That is not to say, of course, that a state's legitimate interests are wholly irrelevant to a section 2 case. But the proper occasion for accommodating those interests is in fashioning a *remedy*, not in determining *liability*. In its current posture, this case does not present the question whether any particular remedy is required. Should petitioners prevail on remand in proving that their voting rights are being diluted by the present election scheme, Louisiana will, in the first instance, have the opportunity to propose a new system that both remedies the denial of petitioners' voting rights and serves the state's legitimate interests. Such a remedy "necessarily depend[s] upon widely varied proof and local circumstances," and Congress has eschewed "prescribing in the statute mechanistic rules for formulating remedies . . . ." Senate Report at 31. Thus, remedial concerns cannot form the basis for a categorical exclusion of judicial elections from coverage

under section 2.

Second, the remedial concerns identified in respondents' brief are an utter makeweight in this case, further showing why such concerns cannot justify a categorical exclusion of judicial elections. For example, respondents identify as "[p]ossibly the most difficult" problems to solve those related to the creation of additional judgeships and population changes. Brief for Respondents at 37. But Louisiana has not added judgeships to its Supreme Court in this century. Nor has it changed the judicial election districts for the Supreme Court since at least 1921. Thus, neither of these "problems" has any bearing whatsoever on this case. Louisiana is entirely free to retain its seven-member Supreme Court. And the inapplicability of one-person, one-vote to judicial districts frees the state from the need to redraw its supreme court districts decennially.[9]

[9]As we have already explained, the feasibility of creating a majority African-American district whose population is equivalent to the so-called "ideal" district size may be relevant to establishing liability, for it is one way of satisfying the causal nexus test delineated in *Gingles*. But it is by no means required that the state's remedy, should liability be proven, comport with one-person, one-vote. The state remains free to accommodate other goals, so long as a complete remedy for the violation of section 2 has been provided.

The problem of actual or perceived bias if justices are elected from "much smaller" districts, Brief for Respondents at 38, is an equally flimsy concern. The division of the existing First Supreme Court District used by petitioners at trial to show how the current district submerged Orleans Parish's African-American majority in an overwhelmingly white multimember district would result, if it were adopted as a remedy, in the creation of two districts, each have a population of well over half a million persons, and each having over 100,000 more residents than one of the existing single-member Supreme Court Districts. *See* Pet. App. at 10a.

At their core, the assertions about impartiality advanced by respondents, *see, e.g.,* Brief for Respondents at 38 7 49-50, and by the Solicitor General at the tail end of his brief, *see* Brief for the United States at 35, are deeply racially insulting. They suggest implicitly that supreme court justices selected by African-American voters

will somehow be less impartial than justices selected by white voters. Permitting states to defend their existing judicial election systems by relying on such a pernicious stereotype is utterly unacceptable. *Cf. Powers v. Ohio,* 59 U.S.L.W. at 4271 (the equal protection clause forbids using race as a "proxy for determining juror bias or competence"); *Batson v. Kentucky,* 478 U.S. 79, 97 (1986) (prosecutors may not strike jurors based "on the assumption . . . or intuitive judgment . . . that they would be partial to the defendant because of their shared race").

The central premise of the Fourteenth and Fifteenth Amendments, as well as of the Voting Rights Act of 1965, especially as it was amended in 1982, is that African-American voters are as qualified as white voters to participate in the process of choosing public officials and that African-American jurists are are able as their white counterparts to fulfill their oath of office.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals and remand this case for further proceedings consistent with its opinion.

Respectfully submitted,

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